IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANCH BANKING & TRUST COMPANY, a North Carolina corporation,

Appellant,

vs.

DOUGLAS D. GERRARD, ESQ., individually; and GERRARD & COX, a Nevada professional corporation, d/b/a GERRARD COX & LARSEN; JOHN DOE INDIVIDUALS I-X; and ROE BUSINESS ENTITIES XI-XX,

Respondents.

Supreme Court No. 73848

Clark County District Court
Case No.: A-16-744561-C

APPELLANT'S REPLY BRIEF

Appeal from the Eighth Judicial District Court, Clark County, Nevada
(Honorable Nancy L. Allf Presiding)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes and Court Rules

Other Authorities

I. FACTUAL REVIEW

The basic chronological facts of this matter, as described in the dismissed First Amended Complaint (the "FAC") and in the Appellant's Opening Brief ("AOB"), have been largely conceded in the Respondents' Answering Brief ("RAB"). These essential facts include the following:

R&S St. Rose LLC ("R&S St. Rose"), borrowed $29,305,250.00 from lender Colonial Bank ("Colonial") (the "First Colonial Loan") (I AA0165-167) which was secured by a first priority deed of trust against the subject "Property" defined therein, recorded on August 26, 2005 (the "First Colonial Deed of Trust"). I AA0167-168; II AA0334 *et seq.* R&S St. Rose also signed a $12,000,000.00 Note in favor of R&S St. Rose Lenders, LLC ("R&S Lenders"), which was secured by a "Second Short Form Deed of Trust and Assignment of Rents" recorded against the Property on September 16, 2005 (the "R&S Lenders Second Deed of Trust"). I AA0168; II AA0362-371.

Colonial later loaned R&S St. Rose approximately $43,980,000.00 (the "Construction Loan"), secured by a Deed of Trust against the Property recorded on July 31, 2007 (the "2007 Colonial Deed of Trust"). I AA0168-169; II AA0373-401. Colonial intended that the 2007 Colonial Deed of Trust would be in a first priority position, with the R&S Lenders Second Deed of Trust to be reconveyed, upon funding of the Construction Loan. I AA0169-170.

In 2008 Colonial learned that this reconveyance never occurred, leading to the disputes litigated in the "Priority Litigation" between Colonial and R&S St. Rose Lenders, among others. I AA0166-172; II AA0297-300; AA0405-426. Colonial was represented in the Priority Litigation by Respondents, Gerrard Cox &

Larson ("GC&L"), who appropriately and accurately argued therein that the August 2005 First Colonial Deed of Trust had priority over the September 2005 R&S Lenders Second Deed of Trust, based on equitable subrogation/replacement. *Id.*

On August 14, 2009, Colonial was closed and placed into an FDIC Receivership (II AA0439-441), and the FDIC as Receiver entered into a "Purchase and Assumption Agreement, Whole Bank All Deposits" (the "PAA"), in order to transfer Colonial's financial assets to BB&T. I AA0172. Based thereon, Respondents substituted BB&T as the plaintiff in the Priority Litigation, in lieu of Colonial, becoming counsel for BB&T. *Id.* at ¶ 46; II AA0443-457.

On October 7, 2009, a Second Amended Complaint was filed in BB&T's name by Respondents (I AA0173 at ¶ 50; II AA0229-245) seeking a judgment recognizing that the 2007 Colonial Deed of Trust had first priority position over the 2005 R&S Lenders Deed of Trust, based on a claim of replacement (an analog to equitable subrogation). This was a valid claim on which BB&T would have prevailed on the merits, if BB&T had been able to demonstrate its own right, as Colonial's successor, to pursue the same. I AA0169-170; I AA0173; II AA0292-304; IV AA0720-729.

A number of events in the Priority Litigation should have apprised Respondents that BB&T would be required to prove at trial, that Colonial's position under the relevant loan documents had been expressly assigned in writing to BB&T, which had thereby succeeded to the right to pursue the Colonial priority claims. I AA0175-180. This critical task could have been accomplished either by discovering and disclosing a then-existing recorded assignment document, beyond

the poorly-worded PAA, or by advising their client BB&T of the need to procure from the FDIC, an adequate new assignment document, to be disclosed prior to trial, and used at trial. *Id.* The Respondents however failed in their duty to timely perform either variation of this task. I AA0175-183.

After the close of BB&T's primary case-in-chief, the opposing parties moved for judgment on partial findings under NRCP 52(c), arguing that BB&T had not established that it had succeeded to and become the owner of Colonial's priority claims. I AA0184-185; II AA0251; III AA0500-506. In response, the following day, Respondents attempted to introduce a previously recorded 2009 Bulk Assignment, which demonstrated BB&T's ownership of its claims. *Id.* However, the court refused to admit or consider this document, ruling it should have been disclosed prior to that date. I AA0185 (FAC at ¶123); III AA0536, ll. 4-5. This evidentiary failure had occurred although this document was publicly recorded prior to the commencement of trial, and prior to a deposition of BB&T's 30(b)(6) witness, and prior to the final pre-trial disclosure exchanges between the parties. I AA0185-186.

Respondents then attempted to introduce into evidence a newly created "Assignment" on which they had just obtained the FDIC's signature. *Id.* The trial court however also refused to admit or consider this document, as also not having been timely disclosed. I AA0186; II AA0251; III AA0537-547. Based thereon, the court ultimately granted the NRCP 52(c) motion. *Id.* Respondents' ability to procure both the 2009 Bulk Assignment, as well as the alternate new assignment document, **literally overnight**, demonstrates that they would have been able to just as easily do so, in a timely manner before trial, *had they but timely recognized the*

need.

In her June 23, 2010 Findings of Fact and Conclusions of Law ("FF&CL") the Priority Litigation trial judge noted that BB&T's claims were dismissed due to an evidentiary defect, as BB&T had failed to establish the Colonial loan documents were ever assigned to BB&T. II AA0252-253. This was due to BB&T's counsel's failure to timely disclose prior to trial, or present at trial, evidence on this point, although the trial court had given them "ample opportunity" to do so. *Id.*; I AA0186-89. The FF&CL therefore concluded, at Finding 143 that "BB&T has not shown the claims or causes of action against defendants being pursued by BB&T belong to BB&T and it . . . [has] the ability to assert these claims . . . ." I AA0188; II AA0270. Based thereon, the FF&CL further concluded that "BB&T is not entitled to relief on its claim for equitable replacement ***since* it has not demonstrated it is a successor in interest.**" I AA0188-189; II AA0271-276 [emphasis added]. These rulings could have been avoided had Respondents timely procured the evidence they were later able to obtain, literally overnight, once they realized the need. I AA0174-190; II AA0252-253; III AA0590.

After entry of a "Final Judgment" by the district court, a Notice of Appeal was timely filed by BB&T on August 12, 2010. I AA0191; IV AA0808. On May 31, 2013 a three-judge panel of this Court rejected this appeal, concluding "**that the district court's decision to grant R&S Lenders' NRCP 52(c) motion after BB&T failed to carry its evidentiary burden to prove its ownership of the Construction Loan was not clearly erroneous**" and also upholding "the district court's decision **to exclude two documents** relating to BB&T's interest in the Construction Loan . . . **because the documents were not properly produced**" in

accordance with the disclosure requirements of the NRCP. [Emphasis added.] *See*, I AA0191 at ¶¶ 158-159; III AA0599.

After this ruling, BB&T timely sought rehearing, which was denied (IV AA0808-809), followed by a timely request for *en banc* rehearing, which was likewise denied (*id*; I AA0192; III AA0603-616; IV AA0809), followed by a timely resort to the United States Supreme Court ("USSC"), via a timely Petition for Writ of Certiorari to that Court (hereinafter the "Writ Petition") (I AA0192-193; III AA0619; IV AA0809), which was denied on October 6, 2014. I AA0192-193; III AA0620-622; IV AA0807-809.

Less than two (2) years later, BB&T then filed this legal malpractice suit on October 5, 2016. I AA0008; AA0165. The district court presiding over this malpractice suit ignored all of the requests for rehearing as well as the Writ Petition and ruled that the statute of limitations had begun to run on May 31, 2013, and therefore dismissed this suit as untimely (IV AA0849-853) and denied a motion to alter or amend (V AA0973-974). This appeal followed.

II. LEGAL ARGUMENT

A. The Standard of Review.

Both Appellant, in its AOB, and Respondents, at pp.12-13 of their RAB, agree this case is subject to *de novo* review. Based on this standard, the district court's decision should be reversed.

B. BB&T's Damages Were Not Certain Until Denial of the Writ Petition.

Respondents contend that, once a judgment is "affirmed on appeal" . . . a legal malpractice "plaintiff's damages are certain and are no longer 'contingent upon the outcome of an appeal.'" RAB at p. 10. This would-be aphorism is

however totally and completely illogical, when an appellant timely exercises its right to petition for further appellate review.

The arguments set forth at pages 13-15 of the RAB, under subheading B, similarly disingenuously misstate the *Semenza* standard, which establishes the need for a court to determine when damages have become certain, rather than establishing the termination of the State court appeal of right, as that date of certainty. In Nevada, "**a legal malpractice action does not accrue until the plaintiff's damages are certain and not contingent upon the outcome of *an* appeal. . . .**" *Semenza v. Nevada Medical Liability Ins. Co.*, 765 P.2d 184, 186, 104 Nev. 666, 668 (1989) (emphasis added).

By determining that the statute of limitations began to run in this case on the date this Court issued its initial ruling on appeal (IV AA0861 at ll. 15-17), the district court ignored the timely filed petitions for rehearing, and then for rehearing *en banc*, to this Court, as well as the timely filed Writ Petition to the USSC. However, while the statute of limitations might have begun running from that May 31, 2013 date if no subsequent timely Requests for rehearing or Writ Petitions were filed, once these filings were timely submitted, they necessarily rendered Plaintiff BB&T's damages uncertain, and contingent on the outcome, until they were resolved. This simple truth is obvious and uncontestable: only *after* all such petitions have *also* been exhausted (if timely brought) can it truly be said that damages are certain and no longer contingent. This Court has continued to rely on a certainty-of-damages principle in its post *Semenza* rulings, and Respondents offer no compelling reason to abandon this reasoning at this time. *Hewitt v. Allen*, 118 Nev. 216, 221, 43 P.3d 345, 348 (2002) ("[W]hen the malpractice is alleged to

have caused an adverse ruling in an underlying action, the malpractice action does not accrue while an appeal from the adverse ruling is pending."); *Brady Vorwerck v. New Albertson's*, 130 Nev. Adv. Op. 68, 333 P.3d 229, 335 (2014) (recognizing ongoing validity of prior delayed claim accrual and tolling case law after and notwithstanding 1997 revisions to language of NRS 11.207).

There is only one way to logically and consistently apply the *Semenza* rule, based on the point and rationale of that rule: a litigation malpractice claim might normally accrue on the date of an adverse judgment; however, if a timely appeal is filed from that judgment, then treating the judgment date as the accrual date is no longer appropriate under *Semenza*, because that filing makes it "too early to know whether damage has been sustained." *Semenza*, 104 Nev. at 668, 765 P.2d at 186. In exactly the same manner, any further attempts to obtain appellate reversal, such as timely rehearing requests to the state supreme court, or a timely Writ Petition (90 days per S.Ct. Rule 13) to the USSC, have the same contingency-creating effect, until the date of their resolution. *See, e.g. Amfac Distribution Corp. v. Miller*, 673 P.2d 792 (Ariz. 1983).

By reasoning that the *Semenza* rule applied only until the first loss in the appellate process occurred, the district court utilized an arbitrary distinction which inappropriately ignored the underlying rationale of *Semenza*: to ensure that claim accrual is only treated as occurring once damages are certain and no longer contingent on any ongoing appellate attempts to reverse the same.

C. Respondents' Reliance on the Remittitur Also Ignores the Rationale of the *Semenza* Rule.

Nor (contrary to Respondents' arguments at pp. 15-23 of the RAB) did the

issuance of the Remittitur render BB&T's damages certain and non-contingent, during the pendency of the Writ Petition, because this Remittitur would have had no effect on a granted Writ Petition.

If the USSC *had* granted the Writ Petition, this Court could not have ignored such a writ of certiorari simply because Remittitur had already issued. Nor, if the USSC had then reversed this Court's ruling in the Priority Litigation appeal, could this Court have chosen to ignore that decision on the grounds that Remittitur had already issued. Therefore, whether or not a stay had ever entered to prevent the remand and remittitur, is completely irrelevant to the uncertainty raised by the Writ Petition filing, which uncertainty delayed claim accrual.

Respondents argue that the large number of cases cited for this point in the AOB are all unavailing and distinguishable because in the instant case the Writ Petition was not granted. This argument misses the point (and attempts to divert this Court's attention from the point) of the AOB's reasoning. *Semenza* does not require *successful* appeal to stay claim accrual (indeed, if an appeal were successful, damages claims against an attorney would evaporate, rendering the question moot, which is why the *Semenza* rule exists). Rather *Semenza* requires a determination of when damages become certain, because appellate attempts to reverse have all failed. That date is simply not affected, one way or the other, by remand and remittitur.

"A stay [of mandate or remittitur] is not essential to the issuance of certiorari, for the writ may issue even though the mandate [or remittitur] of the court below has gone down." *Miller v. Southern Pac. Co.,* 24 P.2d 380, 382 (Ut. 1933). Rather, when the USSC grants certiorari and then remands the case for

further proceedings, the appropriate course of action is for the state supreme court to promptly recall any unstayed remittitur which might in the interim have issued, for the purpose of acting on that development. This is exactly what occurred in, and is thus illustrated by, *City of Long Beach v. Bozek,* 661 P.2d 1072, 1073 (Cal. 1983) ("On January 10, 1983, the Supreme Court of the United States granted a petition for writ of certiorari in this case and ordered that 'The judgment is vacated and the case is remanded to the Supreme Court of California to consider whether its judgment is based upon federal or state constitutional grounds, or both.' (459 U.S. 1095, 103 S.Ct. 712, 74 L.Ed.2d 943.) **Pursuant to this mandate, the remittitur is recalled.**") [Emphasis added.] *See also, Gradsky v. U.S.,* 376 F.2d 993, 995 (5th Cir. 1967).

The Writ Petition was rejected, not accepted, in the present case. If it had been accepted, and a reversal obtained, the present malpractice case would not (as Respondents argue) be subject to a different set of arguments (rendering the instant arguments, as Respondents claim, hypothetical) but rather, the instant case would never have been filed.

But in this case, the Writ Petition *was* rejected. Therefore, this case *was* filed and this Court is *not* being asked to issue an advisory opinion under a hypothetical scenario, as Respondents falsely contend in an attempt at misdirection. Rather, this Court is being asked to answer the non-hypothetical question raised by the *Semenza* test: When did BB&T's malpractice damages become certain (and no longer contingent or uncertain) for purposes of determining the date on which BB&T's claims accrued, and the statute of limitations began to run. The AOB overwhelmingly demonstrated that whether or not a remittitur has issued is entirely

irrelevant to that question, as it is irrelevant to the USSC's ability to grant a writ of certiorari, and then decide whether or not to reverse the highest court of a state, in reviewing the case on the merits. The RAB has not provided any legal authority to the contrary, or which would support the preposterous assertion that a state supreme court could simply ignore the USSC's issuance of a writ of certiorari, or any reversal of the state supreme court, simply because a remittitur had issued. Thus, the timely filed Writ Petition in the instant matter created a contingency under the *Semenza* rule, causing damages to be "uncertain" until it was rejected. Issuance of an unstayed remittitur did not prevent that from being so.

D. BB&T's Failure to Seek a Stay of the Remittitur Is Irrelevant.

Based on the foregoing, BB&T's failure to obtain a stay of the remittitur, emphasized at pp. 18-20 of the RAB, is irrelevant. No such stay was necessary for the Writ Petition to create uncertainty as to the finality of BB&T's damages as long as it was pending.

E. The Claim Accrued on the Date the Writ Petition Was Rejected.

Similarly, based on the foregoing, the arguments raised at pp. 20-23 of the RAB, under subheading F thereof, must also be rejected as irrelevant. The Writ Petition created a contingency and uncertainty which did not evaporate upon issuance of the Remittitur. Respondents' contention that this Court does not need to examine how a recalled remittitur could affect the statute of limitations, because the Remittitur was not recalled, reflects seriously confused reasoning and an attempt to avoid the relevant question.

Even the Respondents agree that the appeal to this Court delayed commencement of the statute of limitations, even though it was not successful.

The question is not whether attempts to reverse BB&T's damages were successful, but rather the date on which such attempts ended, thereby lifting all contingencies and uncertainties as to said damages.

F. Respondents' Tolling Arguments Misconstrue Both Semenza and the AOB.

As pointed out in the AOB, the outcome before the district court in this case was contrary to the rulings among those states which both recognize similar rules to those enunciated in *Semenza* or *KJB*, and have also ruled on the question of whether Writ Petitions to the USSC fall under such rules. *See, e.g., Golden v. McNeal*, 78 S.W.3d 488 (Tex. Ct. App. 2002); *Barker v. Miller*, 918 S.W.2d 749, 752 (Ky. Ct. App. 1996); *MacKenzie v. Leonard, Collins and Gillespie, P.C.*, 2009 WL 2383013 at 3 (D. Ariz. 2009). The RAB fails to address why these authorities should be disregarded and Respondents have not provided any contrary case law overcoming these persuasive authorities.

At pages 23-30 of the RAB, as well as elsewhere, Respondents invite this Court to narrowly construe the meaning of "an appeal" for purposes of the *Semenza* rule (that "a legal malpractice action does not accrue until the plaintiff's damages are certain and not contingent upon the outcome of an appeal"). Respondents rely on technical, procedural, rulings, in inapposite contexts, in which this Court or other courts have distinguished between "an appeal" and other appellate filings, such as writ petitions. However, as helpful as such distinctions may be in other, purely procedural and purely technical contexts, applying them to this case would wholly miss the point of the *Semenza* rule. The rationale of the *Semenza* holding is to prevent the statute of limitations from running while the

Plaintiff's damages are "not certain" but are instead "contingent" on the final outcome of a pending attempt to overturn those losses. This uncertainty obviously exists, not only during state court "appeals" of right, formally designated as such, but also while any appellate petition for rehearing, or Writ Petition, is pending, whether or not discretionary. To rule otherwise undermines the entire rationale of *Semenza*.

G. The Technical Definitions of an Appeal Are not the Focus of the *Semenza* Test.

At pages 27-28 of the RAB, Respondents again cite to various cases (which are all distinguishable as not involving the type of question before this Court), indicating that a Writ Petition to the USSC is not "technically" an "appeal" for certain procedural purposes. While this may be accurate for those purposes in some contexts, the broader meaning of "an appeal" is clearly what the *Semenza* Court meant when it indicated that the statute of limitations would not accrue while "an appeal" was pending which rendered the damages stemming from a malpractice claim uncertain and contingent on the outcome thereof. If *Semenza* did not make this clear, then this Court should take the opportunity presented by this case to clarify this meaning.

H. A Writ Petition Should Be Treated as a Type of "an appeal" Under *Semenza*.

Based on the foregoing, the Writ Petition should be treated as falling under the type of "an appeal" referenced in the *Semenza* rule. As noted in the AOB, the technical procedural definition of an "appeal" is not the only proper usage of that term. Black's Law Dictionary has defined an appeal more broadly, as simply *any* resort to a superior court to review the decision of an inferior court or agency. This

term, in this broad sense, can include both appeals of right and also appeals at the discretion of the higher court, including writ petitions. *Black's Law Dictionary*, p. 96 (West 6th ed. 1990).

The point of the *Semenza* rule is not advanced by narrowly applying technical distinctions between the names of various appellate court filings, but would be ignored and subverted thereby.

Because proximately caused damages are an element of a legal malpractice claim, "such an action does not accrue until . . . damage has been sustained." *Semenza*, 104 Nev. at 667-68, 765 P.2d at 185-86. "[W]here damage has not been sustained or **where it is too early to know whether damage has been sustained**, a malpractice action is premature . . . ." *Id.* In the present case, it was "too early to know whether damage [had] been sustained" until the USSC denied the Writ Petition. This is true regardless of whether that Writ Petition is treated as an "appeal" under some technical definition, or only under the broader definition which the *Semenza* rule was clearly utilizing. Either way, the Writ Petition created uncertainty during the time period it was pending, rendering the Plaintiff's losses "contingent" on the outcome thereof, during that period.

This broader definition of an appeal, as a resort to a higher tribunal, which has been utilized and approved by many courts in a variety of contexts,[1] is clearly the definition of "an appeal" which should be held to have been intended by the authors of the *Semenza* rule, whose concern was to establish an accrual test based on determining when damages had become certain, and no longer contingent on the outcome of any appellate proceedings, and who were *not* concerned with the

[1] *See, e.g.,* cases cited at p.28 of the AOB.

technical procedural nuances which might be important in other contexts.

As the AOB noted, relying upon *Powers v. City of Richmond*, 839 P.2d 1160 (Cal. 1995), the definition of "an appeal" sought by Appellant to be applied herein, is a perfectly normal and proper meaning of that term:

> [W]hen the delegates [to California's Constitutional Convention] spoke of a "right of appeal," they used the term "appeal" to include all forms of appellate review, including but not limited to direct appeal.
>
> This would not be an unusual or improper use of the term "appeal." As a legal term, "appeal" is generally defined as "[r]esort to a superior (*i.e.*, appellate) court to review the decision of an inferior (*i.e.*, trial) court or administrative agency" (Black's Law Dictionary, supra, p. 96, Col. 2) or, in the words of Justice Story, as "a complaint to a superior court of an injustice done by an inferior one" (*U.S. v. Wonson* (1812) 28 Fed.Cas. 745, 748, citing 4 Blackstone's Commentaries 312). Like the term "appellate jurisdiction," the word "appeal" is not necessarily limited to direct appeals, but may include also writ petitions and other procedural devices.

Id. at 1166.

Similarly, when the authors of the *Semenza* decision utilized the term "an appeal" therein, they were likewise clearly intending to refer to that phrase as broadly understood. Only such a broad reading allows for a sensible and consistent application of the *Semenza* rule.

I. The Question Under *Semenza* Is Not Whether or Not an Action Has Been Kept Alive, But Whether Any Uncertainty Exists as to Damages.

At pages 33-35 of the RAB, the Respondents question whether the Priority Litigation was still "alive" during the pendency of the Writ Petition. However, the question under *Semenza* is not whether or not the Priority Litigation was still "alive" (whatever that means) at any particular time, but rather, whether BB&T's

losses had become certain, or remained contingent during a particular time period. The self-evident and logically correct answer to that correct inquiry is that said damages were not certain until the Writ Petition was denied.

J. Respondents' Other Straw Man Assertions Should Be Rejected.

Respondents also argue that accepting BB&T's position in this case would be equivalent to treating the denial of the Writ Petition as an affirmance of the underlying decision. RAB pp. 35-38. This is simply false. None of BB&T's arguments require this Court to treat the denial of the Writ Petition as equivalent to a substantive affirmance.

The question under the *Semenza* test is not whether a lower court's ruling is substantively affirmed or rejected on the merits, or upheld or rejected on other grounds. Rather, the question is whether the damages suffered by a malpractice claimant are rendered uncertain during the pendency of appellate attempts to overturn those losses, which they are.

K. The Strength of the Writ Petition Is Irrelevant.

At pages 38-40 of the RAB, Respondents contend that this Court should examine how likely it was that the Writ Petition would be granted, and should rule against Appellant if this Court accepts Respondents' contention that the Writ Petition was particularly weak.

It is respectfully submitted that such an approach would be disastrous in the amount of ambiguity it would create on the question of whether or not a statute of limitations had begun to run. *Semenza* did not require any examination of the strength or merits of an appeal, but merely indicated that a claim accrues once any appeal (that automatically raises uncertainty as to the finality of damages) is

rejected. *Semenza* should be construed as applying to any appellate proceeding, without the need for ambiguous exercises in weighing the strength of an appeal, or, in this case, of a Writ Petition. Indeed, as Respondents themselves aver elsewhere in their own brief: rejection of the Writ Petition is not to be construed as equivalent to affirmance on the merits; thus, its rejection should simply be treated in a straightforward manner, as the date on which BB&T's damages became certain.

L. Respondents' Attempts to Distinguish the *Kopicko v. Young* Case, Misconstrue the Relevance of that Decision Herein.

The Respondents' arguments also fail to recognize that the *Semenza* rule (preventing accrual of a malpractice claim while an appeal is pending in the litigation where the malpractice occurred), is but one application and illustration of a more fundamental principle, namely, that litigation malpractice claims do not accrue until damages have become certain. As the *Semenza* court explained:

> In Nevada, legal malpractice is premised upon an attorney-client relationship, a duty owed to the client by the attorney, breach of that duty, and the breach **as proximate cause of the client's damages**. *See Warmbrodt v. Blanchard,* 100 Nev. 703, 706–707, 692 P.2d 1282, 1285 (1984). Such an action **does not accrue until the plaintiff knows, or should know, all facts relevant to the foregoing elements and damage has been sustained**. . . . [W]here **damage** has not been sustained **or where it is too early to know whether damage has been sustained**, a legal malpractice action **is premature** . . . .

Semenza, 104 Nev. at 667-68, 765 P.2d at 185-86 (1989). [Emphasis added. Citations and quotations omitted]. Based thereon, "it follows that a legal malpractice action does not accrue until the plaintiff's damages are certain and not contingent upon the outcome" of other appellate proceedings. *Id.*

Semenza's post-appeal-accrual rule is, however, but one illustration and example of the broader and more fundamental claim accrual rule, namely that damages must have been incurred and rendered certain before any claim will accrue. The AOB utilized the case of the *Kopicko v. Young*, 114 Nev. 1333, 971 P.2d 789 (1998), as one illustration of this principle.

The RAB therefore attempts to factually distinguish *Kopicko* from the present case on a number of grounds. However, these are pedantic distinctions which fail to recognize that *Kopicko* was utilized merely to illustrate (but was not required, in order to prove) the salient point (which the RAB ignores): namely, that a claim only accrues once damages have become certain. The specifics of how that issue played out in *Kopicko* are not as important as the principle it illustrates, under which principle the present case should not have been dismissed.

M. Respondents' Public Policy Arguments Are Unavailing.

Respondents public policy arguments, set forth at pages 44-48 of the RAB, should also be rejected. Each of said arguments would apply equally against *Semenza's* delayed claim accrual rule, and against this Court's other, similar, tolling rules.

Thus, by issuing opinions such as *Semenza*, *Hewitt,* and others, this Court has already rejected these Respondents' public policy arguments, in favor of the more compelling public policy reasons supporting the refusal to treat a legal malpractice claim as accrued, until damages are certain. Those public policy reasons, including the avoidance of requiring a litigant to take contrary positions in two pending proceedings, are set forth at I AA0088, and II AA305-306.

N. Respondents' Arguments as to the Merits of the Malpractice Claims Must Be Rejected.

Apparently aware of the many problems with their statute of limitations defense, Respondents also assert that their other arguments for dismissal below should have been accepted, and contend that, even if the statute of limitations does not bar BB&T's claims, their motion to dismiss should have been granted on the alternative theory that the First Amended Complaint failed to state a claim for legal malpractice. This Court can review the lengthy and detailed First Amended Complaint, at I AA0165-0195, and readily determine that Respondents' theories are preposterous, and that it would be premature for an adjudication of Appellant's case within the case elements to occur at this time, under an NRCP 12(b)(5) standard.

The required elements of a legal malpractice claim are (1) An attorney-client relationship; (2) a duty owed by the attorney to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in performing the tasks which they undertake; (3) a breach of that duty; (4) which is the proximate cause of the client's damages, and (5) actual loss resulting from the negligence. *Mainor v. Nault*, 120 Nev. 750, 101 P.3d 308, 324 (2004); *Day v. Zubel*, 112 Nev. 972, 976, 922 P.2d 536, 538 (1996). Plaintiff has alleged all of these elements. I AA0193-0194, as well as specific facts demonstrating the same. I AA0165-019.

Respondents aver that BB&T cannot support the fourth of these elements, that any breach proximately caused BB&T's damages (RAB at p. 49). Respondents argue that BB&T would have lost its underlying priority suit in any event.

In support of this claim, Respondents aver that, after ruling on BB&T's failure to demonstrate that it owned its claims, the Priority Litigation trial court

nevertheless allegedly proceeded to address the merits of the priority issues, and ruled against BB&T thereon. RAB at pp. 49-50. These assertions must be rejected, given the *obiter dicta* nature of any of Judge Gonzalez's rulings which Defendants contend address the merits of the BB&T priority-through-equitable-replacement claims, which ambiguous *dicta* has no preclusive effect.

Judge Gonzalez ruled in her FF&CL that BB&T had not demonstrated that it owned the claims it sought to pursue, including because the only document which might satisfy the statute of frauds, and which was admitted into evidence during Trial, the PAA, was inadequate. II AA0271-272 ¶¶2-17. The district court further recognized that BB&T was *therefore* not entitled to relief on its claims for equitable replacement *because of* ("since") BB&T had failed to establish the assignment to it of Colonial's rights. *Id.* These rulings were all that was needed for the district court to grant the R&S Lenders' request for Declaratory Relief, as to its ability to now foreclose on its earlier recorded deed of trust, and to afford the other relief in favor of the opposing parties, entered against BB&T in the Judgments. Thus, to the extent that any of that court's further findings or rulings, could be construed as a statement on the merits of the claims which BB&T had not demonstrated that it owned, such rulings were wholly unnecessary dicta. II AA0251-0252; AA0270 (at ¶144), AA0271 at ¶¶2-9.

Such dicta cannot be relied upon to reject the present malpractice claims. For example, in *Pollicino v. Roemer and Featherstonhaugh P.C.*, 277 A.D.2d 666, 668 (N.Y. Ct. App. 2000) the appellate court reversed a lower court's grant of summary judgment dismissal of a legal malpractice suit, in a case where the underlying suit against a city transit authority had been dismissed for procedural failures, and

explained that: "Language that is not necessary to resolve an issue . . . constitutes *dicta* and should not be accorded preclusive effect . . . . Here, the law firm's failure to serve a proper notice of claim was an error requiring dismissal, and [the underlying court] dismissed the complaint on that ground. Its [extraneous] comment concerning the merits of plaintiff's claim [indicating that it would have been dismissed in any event for failure to show that the Authority had notice of a dangerous condition], however, clearly was *dicta* and, as such, is not entitled to preclusive effect" in the subsequent legal malpractice case. *Id.* [Clarifying bracketed language added.]

Similarly, Respondents' analogous arguments, that certain of the original court's rulings, in its FF&CL, suggest what the outcome would have been on the merits of the equitable replacement claim, must likewise be rejected as grounds for dismissal of this malpractice suit. Where earlier rulings sought to be relied on in a later case were unnecessary *dicta*, the doctrine of issue preclusion does not apply. Rather, to invoke that doctrine, a four-part test must be met, which includes, as tests 2 and 4, that the earlier "ruling must have been **on the merits** and have become final" and that the subject issue must have been "actually **and necessarily** litigated." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008) (emphasis added).

In the present case, the Priority Litigation was not resolved on the merits, but due to a procedural evidentiary failing; and the issue of whether or not BB&T would have prevailed in its equitable replacement claim, to establish priority of the later Colonial Deed of Trust was not "necessarily" litigated. Rather, that issue became moot, upon the original court's determination that BB&T had not shown

that it owned the right to assert that theory in the first place. Thus, that court's indications, if any,[2] as to how it might have ruled thereon were unnecessary *dicta*. The Restatement (Second) of Judgments §27, entitled "Issue Preclusion-General Rule" explains this anti-*dicta* rule as follows, at comment h: "*h. Determinations not essential to the judgment.* If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of *dicta*, and may not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation."

See also, Kahn v. Morse & Mowbray, 121 Nev. 464, 117 P.3d 227 (2005)(district court improperly granted summary judgment dismissal of malpractice claims against law firm where the factual bases for the legal malpractice claim were not actually and necessarily litigated in the prior lawsuit); *Schultz v. Boston Stanton*, 198 P.3d 1253, 1257 (Colo. Ct. App. 2008) (rejecting criminal defense lawyers defense to malpractice case, stemming from lawyers' negligent failure to procure key witness for trial, and rejecting lawyers' reliance on an order denying motion for new trial in underlying case, where said order listed multiple grounds for the ruling, and was therefore "not conclusive" on the issue of the witness's importance "standing alone").

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[2] It is not entirely clear that Judge Gonzalez's ambiguous *dicta* fully reached the substantive conclusions on the merits now claimed by Respondents.

The rule against affording any preclusive effect to *dicta* is based on a number of policy considerations, including that "unnecessary findings are usually not subject to appellate review." *Hansted v. Safeco Ins. Co. of America*, 562 A.2d 1148, 1150 (Conn. Ct. App. 1989), quoting F. James & G. Hazard, Civil Procedure (3d Ed.) §11.16-11.19). The present case illustrates this point, as this Court, when upholding Judge Gonzalez's rulings in the underlying case, did not directly address or discuss the substantive merits of any of Judge Gonzalez's rulings, beyond BB&T's failure to demonstrate its ownership of the claims. III AA0598-600.

For the foregoing reasons, the district court rejected these arguments, and ruled solely on statute of limitations grounds herein. IV AA0787, ll. 12-20; IV AA0850, ll. 25-27. This was appropriate: Respondents' arguments are based on a faulty premise. The question to be litigated before the district court in the present matter (upon reversal by this Court and remand for trial) is *not* how Judge Gonzalez would have ruled, but will be to now newly and objectively reach the merits of questions which the underlying court need never have reached in the first place. *See e.g., Nelson v. Quarles and Brady, LLP*, 997 N.E.2d 872, 894 (Ill. Ct. App. 2013)("A malpractice plaintiff is not required to demonstrate what award the original judge or jury would have made if no malpractice had occurred. Once a malpractice Plaintiff has demonstrated that his attorney fell below a reasonable standard of professional conduct, the fact finder must [then, instead] determine what a reasonable judge or jury would have concluded and compare that conclusion to the actual resolution of the underlying action to determine damages."); *Mattco Forge, Inc. v. Arthur Young & Co.*, 60 Cal.Rptr.2d 780, 793 (Ct. App. 1997)("The trial-within-a-trial [of a legal malpractice claim] . . . does not

recreate what a particular judge . . . would have done. Rather, the . . . standard remains an objective one . . . what should have been, not what the result would have been . . . before a particular judge or jury."); *Collins v. Miller & Miller, Ltd.*, 943 P.2d 747, 756 (Ariz. Ct. App. 1996)(causation element of legal malpractice case requires a showing of what a reasonable judge or jury would have decided in the underlying action); Restatement (Third) of Law Governing Lawyers section 53, comment b (2000)("The judges or jurors who heard or would have heard the original trial or appeal may not be called as witnesses to testify as to how they would have ruled" as such testimony would be irrelevant "the issue [being] how a reasonable judge or jury would have ruled.").

Moreover, even if the underlying court's unnecessary *dicta* could be used for preclusive effect, the use to which Respondents wish to put the court's *dicta* in this case is untenable, as demonstrated by the legal analysis provided to the district court at II AA0297-0304.

Given that the entire BB&T suit was rejected because of the failure to timely submit admissible evidence that BB&T owned Colonial's rights, the merits of these arguments were never truly or necessarily adjudicated and fairly and substantively analyzed on the merits, including on appeal to this Court, which upheld the district court's determination to exclude untimely disclosed evidence of BB&T's ownership and affirmed the lower court on that basis. III AA0598-600. The FAC adequately alleges that BB&T would have prevailed on the merits in the Priority Litigation, either before the district court *or on appeal*, were it not for the evidentiary failure caused by the Respondents' procedural and other errors, which prevented a true merits review from occurring (I AA0169-170; I AA0188 at ¶¶140-

141; I AA0189 at ¶¶145-147; I AA0192-193 at ¶¶167-168; 177), and dismissal of those FAC contentions on an NRCP 12(b)(5) basis would be inappropriate

Ultimately, it is difficult in the limited space afforded within a reply brief, to fully respond to the Respondents' positions on these extraneous points, which were already rejected by the district court, and thus not discussed in the AOB. However, further analysis of these issues, demonstrating why the district court was correct to reject these arguments, is set forth at II AA0292-0304; and IV AA0720-729.

III. CONCLUSION

For the reasons set forth above and in the AOB, this Court should reverse the dismissal of this action, and remand this case to the district court.

DATED this 4th day of June, 2018.

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ATTORNEY'S RULE 28.2 CERTIFICATE

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 4th day of June, 2018.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on this 4th day of June, 2018, the foregoing **APPELLANT'S REPLY BRIEF**, was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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